I negate,

Judgments about what ought to be, contain non-cognitive thoughts that skew our rational process. **Hart:** HLA Hart http://www.jstor.org/stable/1338225 “Positivism and the Separation of Law and Morals” Feb., 1958) British legal philosopher, and a major figure in political and legal philosophy. He was Professor of Jurisprudence at Oxford University and the Principal of Brasenose College, Oxford. PE

Nonetheless I think (though I cannot prove) that insistence upon the distinction between law as it is and ought to be has been, under the general head of "positivism," confused with a moral theory according to which statements of what is the case ("statements of fact") belong to a category or type radically different from statements of what ought to be ("value statements"). It may therefore be well to dispel this source of confusion. There are many contemporary variants of this type of moral theory: according to some, **judgments of what ought to be,** or ought to be done, either are or **include** as essential **elements** expressions **of** "feeling," "**emotion**," or "attitudes" or "**subjective preferences"**; in others such judgments both express feelings or emotions or attitudes and enjoin others to share them. **In other variants such judgments indicate that a particular case falls under a** general principle or **policy of action** which the speaker has "chosen" or to which he is "committed" and **which is itself** not a recognition of what is the case but **analogous to a** general "imperative" or **command** **addressed to all** including the speaker himself. Common to all these variants is the insistence **that judgments of what ought to be done**, because they **contain** such "**noncognitive**" **elements**, cannot be argued for or **[not] established by rational methods** as statements of fact can be, and cannot be shown to follow from any statement of fact but only from other judgments of what ought to be done in conjunction with some statement of fact. We cannot, on such a theory, demonstrate, e.g., that an action was wrong, ought not to have been done, merely by showing that it consisted of the deliberate infliction of pain solely for the gratification of the agent. **We only show it to be wrong if we add** to those verifiable "cognitive" **statements of fact** a general principle not itself verifiable or "cognitive" that the infliction of pain in such circumstances is wrong, ought not to be done. Together **w**ith this general distinction between statements of what is and what ought to be go sharp parallel distinctions betweeh statements about means and statements of moral ends. We can rationally discover and debate what are appropriate means to given ends, but ends are not rationally discoverable or debatable; they are "fiats of the will," expressions of "emotions," "preferences," or "attitudes."

Thus, the existence of laws must stand separate from their validity- blurring this distinction would dissolve the will of the state into the will of an individual. **Hart Summaries Austin:** HLA Hart http://www.jstor.org/stable/1338225 “Positivism and the Separation of Law and Morals” Feb., 1958) British legal philosopher, and a major figure in political and legal philosophy. He was Professor of Jurisprudence at Oxford University and the Principal of Brasenose College, Oxford. PE

**The existence of law is one thing; its** merit or **demerit is another.** Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. **A law, which** actually **exists, is a law, though we happen to dislike it,** or though it vary from the text, by which we regulate our approbation and disapprobation. **This truth, when formally announced as an abstract proposition**, is so [**seems] simple** and glaring that it seems idle to insist upon it. **But** simple and glaring as it is, **when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume** .Sir William Blackstone, for example, says in his "Commentaries, "that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original. Now, he may mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law is a law. Austin's protest against **blurring the distinction between what law is and what it ought to be is** quite general: it is **a mistake**, whatever our standard of what ought to be, whatever "the text by which we regulate our approbation or disapprobation." His examples, however, are always a cpnfusion between law as it is and law as morality would require it to be. For him, it must be remembered, **the fundamental principles of morality** were **[are] God's commands**, to which utility was an "index": besides this there was the actual accepted morality of a social group or "positive" morality. Bentham insisted on this distinction without characterizing morality by reference to God but only, of course, by reference to the principles of utility. Both thinkers' prime reason for this insistence was to enable men to see steadily the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order. Bentham's general recipe for life under the government of laws was simple: it was "to obey punctually; to censure freely."13 But Bentham was especially aware, as an anxious spectator of the French revolution, that this was not enough: the time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured.14 Yet, this was precisely what the confusion between law and morals had done and Bentham found that the confusion had spread symmetrically in two different directions. **On the one hand** Bentham had in mind **[the danger in] the anarchist who argues thus: "This ought not to be the law**, **therefore it is not and I am free not merely to censure but to disregard it."** On the other hand he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth. Both errors, Bentham thought, were to be found in Blackstone: there was his incautious statement that human laws were invalid if contrary to the law of God,15 and "that spirit of obsequious quietism that seems constitutional in our Author" which "will scarce ever let him recognise a difference" between what is and what ought to be.'6 This indeed was for Bentham the occupational disease of lawyers: "[I]n the eyes of lawyers - not to speak of their dupes -that is to say, as yet, the generality of non-lawyers -the is and ought to be . . . were one and indivisible." 17 There are therefore two dangers between which insistence on this distinction will help us to steer: the danger **[is] that law** and its authority **may be dissolved in man's conceptions of what law ought to be** and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.

Thus the **standard** is consistency with a positivist rule of law. This means that we are consistent with our prima facie duty to obey the law.

I contend that jury nullification conflates what the law is and what it ought to be.

Jury nullification undermines the law threatening the legal system as a whole. **Niewert:** David Niewert (freelance journalist). “Spreading Extremism.” Orcinus. 10 Octo- ber 2003.<http://dneiwert.blogspot.com/archives/2003_10_05_dneiwert_archive.html>

**There is** in fact **a long history of** , **jury nullification** both **in American** and English law -- cases in **which the jurors simply ignored the requirements of the law** and set the accused free. However, it has primarily been viewed as a malfunction of the law, not as a positive principle to be practiced . "**Nullification is, by definition, a violation of a pro, oath to apply the law** as instructed by the court,. according to a 1997 federal ruling, the strongest, most recent court decision on the topic. The opinion by Judge Jo. Cabranes said ,**jurors who reject the law should not be allowed to serve**; when the ruling was appealed, the courts upheld, but also ordered a new trial after declaring that only ',unambiguous evidence" of a pro, disregard of the law can ,justify his dismiss. Other ,jurists have been equally clear about the actual standing of pry nullification: "**It is a recipe for anarchy** . . [when pros] are allowed to substitute personal whims for the stable and established law -- Colorado circuit Judge Frederic B. Rodgers "Jury nullification is indefensible, because, by definition, it amounts to pror pegury -- that is ,jurors lying under oath by deciding a ca. contrary to the law and the evidence after they have sworn to decide the case according to the law and the evidence -- D.C. Superior court Judge Nenry F Greene **In essence, ,jury nullification** -- **by sitting in judgment not ,just the facts of the case but of the laws themselve**s -- arrogates to itself not only the role of the ,judge but of the legislature, essentially overturning at whirr those laws that have been pas.d through democratic processes. In this sense, j,ury nullification **is a threat not only to the courts, but to the very systems of laws on which the nation rests.**

Jury nullification allows jury to make laws based on their personal sense of fairness. **The ABA Journal:** The Aba Journal “Nihilism at Santa Barbra” October 1971 PE

The [w]ork of institutions such as the Center for the Study of Democratic Institutions at Santa Barbara certainly deserves to be encouraged. The nation needs organizations, not connected with either local or national government, in which impartial and objective research is done on the manner in which our governments are operating. Now and then, however, proposals are made that are not only on the silly side but also dangerous to the fundamental principles on which our system of government is based. This is illustrated by a position taken by Jon M. Van Dyke, a visiting fellow at the center, in a discussion on "The Jury as a Political Institution." According to the center's magazine of July, 1970, Professor Van Dyke urged that jurors be given full authority to disregard the instructions of the judge as to what the law is, stating: "We should tell the jurors that they have the power to acquit, even if the accused's activities have violated the law as it is articulated by the trial judge." **Certainly no principle of law could survive if a jury were free to disregard it,** **substituting only the jury's own sense,** which might be rational or emotional**, of what fairness and justice require**. As a participant in the same panel at which Professor Van Dyke made his proposal, Abe Fortas, the former [U.S.] Supreme Court Justice, put his finger on the vice of the proposal by pointing out: In effect, **it is an attack upon law itself.** In effect, it is an assertion of the right of the individual to determine for himself what the standard of his conduct shall be. **What is being proposed is** not merely that jurors should be given the power to determine what is the law, but **that** they **[jurors] should** be instructed that they **may acquit a defendant even though they believe that he did something the law forbids. This** goes to the heart of our society because it **says that this shall not be a society in which there are general rules of law** and conduct **which apply to everybody and to which everybody is held accountable**